Filed 3/5/19 P. v. Romero CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. GERARDO ROMERO ROMERO, Defendant and Appellant.	C085965 (Super. Ct. No. 62-146422)

Defendant Gerardo Romero Romero confronted his wife in front of their home and shot her in the chest. A jury found him guilty of attempted murder. The jury also found that he acted willfully, deliberately, and with premeditation, and found an alleged firearm enhancement to be true. He was sentenced to an indeterminate term of 32 years to life in prison.

On appeal, defendant contends that: (1) his trial counsel was constitutionally ineffective for failing to request a pinpoint jury instruction that provocation can raise a reasonable doubt regarding premeditation and deliberation; (2) an amendment to Penal

Code section 12022.53, which went into effect while his case was pending on appeal, applies retroactively to him, thus requiring remand for the trial court to consider exercising its newly-granted discretion to strike the firearm enhancement; and (3) that the court imposed an unauthorized sentence for his attempted premeditated murder conviction.[1]

The People agree remand is appropriate to allow the trial court to consider striking the firearm enhancement, but otherwise contest defendant's appellate contentions.

We conclude counsel's failure to request a pinpoint instruction on provocation was not prejudicial and that the sentence imposed by the court was authorized. We shall remand the matter for resentencing, however, to allow the trial court to decide whether to exercise its discretion to strike the firearm enhancement.

I. BACKGROUND

A May 2017 information charged defendant with the attempted murder of his wife, M.E. (§§ 664/187, subd. (a).) The information alleged that the attempted murder was willful, deliberate, and premeditated, that defendant intentionally and personally discharged a firearm resulting in great bodily injury (§ 12022.53, subd. (d)), and that he inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). The following evidence was adduced at trial.

Defendant and M.E. had been married for 23 years. They emigrated from Mexico and eventually settled in Roseville with their four children. Around May 2016, defendant began accusing M.E. of having an affair. When M.E. told defendant she wanted to separate, he responded that he would rather kill her than allow her to live with someone else.

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[1] Further undesignated statutory references are to the Penal Code.

On July 3, 2016, M.E. called her cousin, S.M., for a ride to work and also asked him to watch her youngest daughter during her shift. As she left her house with her daughter to meet up with S.M., M.E. saw defendant sitting in his truck parked outside. Defendant got out of his truck and stepped in front of M.E., telling her not to leave the house; he tried to prevent her from walking away. M.E. continued down the street to meet her cousin. Defendant followed her before returning to his truck.

Defendant drove to where S.M. was parked and accused him of "pimping" and "covering for" M.E. S.M. told defendant that he did not want to be involved with their problems. M.E. put her daughter in S.M.'s car, but defendant prevented her from getting in the car. S.M. told M.E. to call the police because defendant was " 'not looking good.' " She told him she was not afraid of defendant and that defendant was not going to hurt her. Before S.M. left, defendant told him that "it would be over in 30 minutes."

Defendant told M.E. to go home because he wanted to " 'go take care of this because [he] want[ed] this to be over.' " M.E. returned to the house to talk to defendant. When they arrived, defendant parked his truck and made a phone call, telling the person on the other end of the line, " 'Come to my home. What I'm going to do, I want to do it in front of you.' " Defendant made a second and third call, telling someone, " 'Meet me where we agreed. This will be over soon,' " and, " 'Hurry up because I want this to be over.' "

One of the people defendant called was his coworker and friend, Jacob. A few weeks prior, defendant had asked Jacob to help him and M.E. with their marital problems. According to Jacob, he spoke with defendant two or three times the day of the shooting. During the first call, Jacob realized that defendant was at M.E.'s house. He tried to convince defendant to leave. During the second or third call, Jacob heard defendant arguing with someone who Jacob believed to be M.E. At some point, defendant was crying and told Jacob, " 'I'm going to fucking kill this bitch.' " Jacob

tried to call defendant back, but got no answer. Worried that things "just didn't seem right," he called the police because he thought "something was going to happen."

M.E. became frustrated that defendant was calling other people about their problems. She opened and slammed defendant's truck door several times, asking him why he needed to involve other people. Defendant responded, " 'Okay, then. Let's go inside.' " Unbeknownst to M.E., defendant grabbed a loaded gun and put it in his waistband before getting out of the truck.

After exiting the truck, defendant began walking towards the house. M.E. followed. A few steps from the house, defendant turned toward M.E. and asked " 'Is that all we're going to do? We're going to end it all?' " and, " 'Is this the way you want it to end?' " M.E. responded yes, since he was never going to change. Defendant replied, " 'That's okay.' " He then lifted his shirt, pulled out the gun from his waistband, pointed it at M.E., who was about five feet away, and shot her in the chest as she screamed. The bullet penetrated her left wrist and entered her body under her left breast; it lodged in her back near her spine.

M.E.'s legs went numb and she fell towards defendant, grabbing onto his waist. She told him that she had loved him and would always love him. Defendant pointed the gun at his own head, telling her, " 'Do you see what we've come to? I'm also going to shoot myself.' " M.E. begged him not to because she was going to die and their children would be left alone.

M.E.'s cousin, F.E., lived nearby and heard the gunshot and scream. He went to M.E.'s house and saw defendant looking scared. F.E. asked defendant, " 'What have you done?' " M.E. told F.E. to call an ambulance because defendant shot her.

Defendant rolled M.E. off him, stood up, and fled in his truck. F.E. left to get help. Police and emergency responders arrived at the scene a short time later and transported M.E. to the hospital. Officers found a spent casing and a live round near

where M.E. was on the ground. Officers also learned that defendant may have fled to the home of a coworker, Mardy, in Loomis.

Defendant had in fact driven to Mardy's house. Defendant entered the home and asked Mardy's wife, Rachel, where her husband was; he told her that he needed a ride. He did not tell her that he had just shot his wife. Rachel, who was on the phone with Mardy, handed the phone to defendant. Defendant said he needed help and a ride, and asked when Mardy was coming home. Mardy responded that he was on his way. Defendant then drove his truck into a nearby RV area on Mardy's property and parked the truck under a shed before going back into the house.

On the way home, Mardy was stopped by police, who had closed down the road to his house. After learning that defendant had shot his wife, Mardy called Rachel and told her what defendant had done; he instructed her to remove their four children from the house because the police were coming in to get defendant. Rachel took the children outside and had them climb over a fence into an adjoining yard. Rachel saw defendant exit her house and jump over a fence as he fled.

The next morning, Mardy and his family returned to their house. Defendant appeared and asked Mardy to take him to jail. On the way, defendant asked Mardy how the police knew he was at his house. Mardy responded that Jacob, whom defendant had called before he shot M.E., had called the police. Although defendant did not ask about M.E., Mardy told him that she had survived. He mentioned that she had been shot twice. Defendant replied, " 'No. I only shot her one time,' " demonstrating with his hand. Concerned the gun was on his property, Mardy asked about the weapon. Defendant claimed he tossed it in a creek. The parties stipulated at trial that the firearm was never found by police.

Defendant testified on his own behalf. He claimed that M.E. had told him she was having an affair several days before the shooting.

Defendant said he awoke early on July 3, 2016, to do yard work. He drank some beer. He came to the realization that M.E. no longer wanted him to live at the house and decided he was going to leave. Later, he left to drink with some of M.E.'s family members.

Before leaving the house, he grabbed a loaded gun that he kept hidden in a backyard shed. He had purchased the gun two months earlier, around the time he began accusing M.E. of having an affair. He claimed he bought the gun from someone on the street for protection. Although he initially testified that he did not know anything about guns, he conceded that he knew the gun was loaded because he had looked at the magazine before inserting it into the gun. He left the gun in the truck when he went drinking with M.E.'s relatives.

Sometime later that morning, M.E. called him and told him that their son wanted to hit her so defendant drove to the house. He testified that after M.E. dropped their daughter off with S.M., she walked towards him, yelled at him, and hit his truck. At that point, he called Jacob and M.E.'s brother-in-law to come over to help him calm her down.

He also said he wanted to discuss with M.E. getting his money and half of everything. According to defendant, he and M.E. did not argue when they went back to the house. Although he felt sad, he was not mad, angry, or upset. He denied yelling at M.E, although M.E.'s conduct frustrated him.

Defendant admitted putting the gun in his waistband before getting out of his truck to talk to M.E. While M.E. yelled at him, defendant decided to scare her with the gun to calm her down. He pulled the gun from his waistband, pointed it at her, and then the gun accidentally fired. He denied pulling the trigger, and claimed he had been shaking and did not know how the gun went off on its own. When asked whether he intended to shoot M.E., defendant responded that he never thought of hurting her.

Defendant conceded he called Jacob and told him he was going to kill M.E. just before he shot her, but claimed he was joking. When he told M.E.'s cousin that "it would be over in 30 minutes," and asked another relative to come over to the house to see what he was going to do, he simply meant the relationship would be over and that "her family could come over and help [them] with that." Although he said he never thought of hurting M.E., defendant conceded on cross-examination that in 2003 he had punched his wife in the face and been convicted of misdemeanor domestic violence.

Following the close of evidence, the court informed counsel outside the jury's presence that it was considering instructing the jury on the lesser included offense of attempted voluntary manslaughter based on heat of passion. Defense counsel objected, arguing that defendant testified the shooting was accidental and that insufficient evidence supported giving CALCRIM No. 603, the attempted voluntary manslaughter instruction. For the same reasons, defense counsel stated that he was not asking the court to give CALCRIM No. 522, which is a pinpoint instruction that addresses the effect of provocation on the degree of murder. The court ruled that sufficient evidence supported giving an attempted voluntary manslaughter instruction, and it instructed the jury with CALCRIM No. 603. Defendant did not request and the court did not instruct the jury with CALCRIM No. 522. During closing argument, defense counsel emphasized the theory that the shooting was an accident, but also noted that the jury could find defendant attempted to kill M.E. impulsively during a heat of passion.

After deliberating for approximately an hour and a half, the jury found defendant guilty of attempted murder and found that the offense was willful, deliberate, and premeditated. The firearm enhancement was also found true.[2] The court sentenced defendant to an indeterminate term of 32 years to life, consisting of life with the

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[2] The great bodily injury under circumstances involving domestic violence allegation did not go to the jury after the parties stipulated M.E. had suffered great bodily injury.

possibility of parole with a minimum sentence of seven years for the premeditated attempted murder offense plus a consecutive 25 years to life for the section 12022.53 firearm enhancement. Defendant timely appealed.

II. DISCUSSION

A. Ineffective Assistance of Counsel

Defendant contends his counsel was constitutionally ineffective in choosing not to request a pinpoint jury instruction on provocation after the trial court decided to instruct sua sponte on heat of passion attempted voluntary manslaughter as a lesser included offense to the attempted murder charge. He contends his trial counsel should have requested an instruction, based on CALCRIM No. 522, that evidence of provocation, even if it is insufficient to negate the malice required for attempted murder, may be sufficient to create a reasonable doubt that he committed the attempted murder after premeditation and deliberation. We need not decide whether counsel's failure to request the instruction fell below an objective standard of reasonableness because the absence of CALCRIM No. 522 was not prejudicial.

To establish ineffective assistance of counsel, defendant must show, by a preponderance of the evidence, that his counsel's representation fell below the standard of a competent advocate and a reasonable probability exists that, but for counsel's errors, the result would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218 (*Ledesma*).) A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) In determining whether counsel's performance was deficient, we exercise deferential scrutiny and "assess the reasonableness of counsel's acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act." (*Ledesma, supra*, at p. 216.) "Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) If "it is easier to dispose of an ineffectiveness claim on

the ground of lack of prejudice, . . . that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697 [80 L.Ed.2d 674, 699].)

In this case, the trial court instructed the jury on attempted murder as charged as well as on attempted voluntary manslaughter as a lesser included offense. To find defendant guilty of attempted murder, the jury was instructed in part that the People had to prove defendant "took one direct but ineffective step towards killing another person" and "intended to kill that person." (See CALCRIM No. 600.)

If they found defendant guilty of attempted murder, the trial court instructed the jurors that they then had to decide whether the People had proved the additional allegation that defendant committed the attempted murder willfully and with premeditation and deliberation. With regard to deliberation and premeditation, the court instructed: "The [d]efendant *deliberated* if he carefully weighed the considerations for and against his choice and[,] knowing the consequences[,] decided to kill. [¶] The [d]efendant acted with *premeditation* if he decided to kill before completing the act of attempted murder. . . . [¶] . . . [¶] A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time." (See CALCRIM No. 601, italics added.)

The court also instructed the jury that "[a]n attempted killing that would otherwise be attempted murder is reduced to attempted voluntary manslaughter if the [d]efendant attempted to kill someone because of a sudden quarrel or in the heat of passion." (See CALCRIM No. 603.) The trial court instructed the jury on sudden quarrel and heat of passion pursuant to CALCRIM No. 603 as follows:

"The [d]efendant attempted to kill someone because of a sudden quarrel or in the heat of passion if, number one, the [d]efendant took at least one direct but ineffective step toward killing [a] person; the [d]efendant intended to kill that person; [t]he defendant

attempted the killing because he was provoked[;] [¶] [a]nd, number four, the provocation would have caused an ordinary person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment[;] [¶] [a]nd, number five, the attempted killing was a rash act done under the influence of intense emotion that obscured the [d]efendant's reasoning or judgment.

"Heat of passion does not require anger, rage, or any specific emotion. It . . . can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

"In order for a sudden quarrel or heat of passion to reduce an attempted murder to an attempted voluntary manslaughter, the [d]efendant must have acted under the direct and immediate influence of provocation as I have defined it. [¶] While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

"It is not enough [that] the [d]efendant simply was provoked. The [d]efendant is not allowed to set up his own standard of conduct. You must decide whether the [d]efendant was provoked and whether the provocation was sufficient. [¶] In deciding whether the provocation was sufficient, consider whether an ordinary person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than judgment.

"If enough time passed between the provocation and the attempted killing for an ordinary person of average disposition to cool off and regain his or her clear reasoning and judgment, then the attempted murder is not reduced to attempted voluntary manslaughter on this basis.

"The People have the burden of proving beyond a reasonable doubt that the [d]efendant attempted to kill someone and was not acting as a result of sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the [d]efendant not guilty of attempted murder." (See CALCRIM No. 603.)

Defendant contends that once the trial court decided sua sponte to instruct the jury with the lesser included offense of attempted voluntary manslaughter, his counsel was constitutionally ineffective for failing to request a pinpoint instruction on provocation. (*People v. Rogers* (2006) 39 Cal.4th 826, 878 [predecessor instruction to CALCRIM No. 522 was pinpoint instruction that need not be given absent a request].) In hindsight, he complains of counsel's tactical decision to rely primarily on the defense that the shooting was accidental, which he now claims had no reasonable possibility of success under the facts presented.

According to defendant, his trial counsel should have requested an instruction on what effect provocation may have played in creating a reasonable doubt regarding premeditation and deliberation, along the lines of CALCRIM No. 522, which provides in relevant part: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]"

We need not decide whether defense counsel was ineffective for failing to request CALCRIM No. 522 because defendant was not prejudiced; the evidence was overwhelming that defendant's attack on M.E. was willful, deliberate, and premeditated. In other words, it is not reasonably probable that but for counsel's alleged error, the result would have been different. (*Ledesma, supra*, 43 Cal.3d at pp. 216-218; *People v. Bolin, supra,* 18 Cal.4th at p. 333.)

As instructed, the jury could have found defendant guilty of attempted murder and yet concluded he did not act willfully and with premeditation and deliberation since the court instructed the jury to consider the premeditation and deliberation allegation only if it first found defendant guilty of attempted murder.

The jury was also fully instructed on the meaning of provocation and on the meaning of premeditation and deliberation. It was instructed that provocation causes someone to react from passion rather than judgment, and that "[a] decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated." Furthermore, as defendant concedes, the absence of CALCRIM No. 522 did not preclude the defense from arguing provocation played a role in preventing the defendant from premeditating and deliberating.

The evidence, moreover, established that defendant was not provoked before the shooting, but rather reflected, prepared, and planned the attack. Defendant bought the gun at the same time he started to believe his wife was having an affair. He knew the gun was loaded.

Although defendant admitted being sad, he testified that he and M.E. were not arguing at the house, and that he was not mad or angry when talking with his wife the day he shot her. Even crediting his testimony that M.E. told him she was having an affair three days before the attack (although no other evidence supported the self-serving statement), between that moment and the attack, defendant had adequate time to calm himself and reflect on the situation. Defendant continued staying at the house and even awoke early on the morning of the shooting to have a beer and clean up the backyard. He then went to socialize with his wife's relatives.

When he returned to his house to talk to his wife, he put the loaded gun in his waistband rather than leaving it in his truck, like he had previously done that morning when drinking with M.E.'s relatives. (See *People v. Watkins* (2012) 55 Cal.4th 999, 1026 [carrying a loaded gun to the position from which the defendant shot the victim was sufficient evidence of planning]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 ["[t]hat [the] defendant armed himself prior to the attack 'supports the inference that he planned a violent encounter' "].) He told M.E.'s cousin that it would all be over in 30 minutes. Defendant then called Jacob and told him he was going to kill M.E. and made other

phone calls in which he asked the person to come over to the house, as they had agreed, to see what he was going to do. The jury was free to reject, as it did, defendant's dubious claims that he merely meant his relationship would be ending soon and that he was joking about killing M.E., especially since he told her he would kill her rather than let her live with someone else.

As M.E. followed defendant to the house to talk about their relationship, he turned around, pointed the gun at her chest, and shot her at close range. Firing a gun at a vital area at close range is evidence of premeditation and deliberation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1082.)

In short, the evidence of defendant's planning, motive, and manner of killing shows that the attempted murder was premeditated and deliberate. (See, e.g., *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 [identifying three facts commonly present in cases of premeditated and deliberated murder: planning activity, motive, and manner of killing]; *People v. Watkins, supra,* 55 Cal.4th at p. 1026 [finding "sufficient evidence of planning (carrying the loaded, concealed pistol to the position behind the hood of the truck), motive (to effectuate a robbery or its attempt by killing the victim-witness, or simple revenge because [the victim] did not relinquish money) and a manner of killing indicative of intent to kill (a shot fired from a pistol with a heavy trigger pull, which hit the victim's elbow and abdomen as the victim walked quickly away)"].) Even if the jury had been instructed with CALCRIM No. 522, it is not reasonably probable that it would have found defendant attempted to murder M.E. without premeditation and deliberation. Defense counsel's decision not to request the pinpoint instruction on provocation thus did not prejudice defendant.

B. Firearm Enhancement

Defendant contends recent legislative amendments to the firearm enhancement statutes require remand so that the trial court may consider whether to exercise its newly-granted discretion to strike the section 12022.53, subdivision (d) firearm enhancement.

The People concede the legislation applies retroactively to defendant, and that remand is necessary to allow the court to consider exercising its discretion to strike the firearm enhancement. We agree the amendment applies retroactively and shall remand the matter for the trial court to consider whether to strike the section 12022.53 enhancement.

C. Unauthorized Sentence for Attempted Murder

Defendant contends the trial court imposed an unauthorized sentence for the attempted murder conviction, and that the minute order and abstract of judgment must be corrected accordingly. According to defendant, the minutes and abstract of judgment should only state that he was sentenced to life with the possibility of parole, and cannot include the additional information that defendant must serve a minimum seven-year term before being eligible for parole pursuant to section 3046. We disagree.

A sentence is unauthorized if it "could not lawfully be imposed under any circumstances in the particular case." (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

Under California law, some serious felonies carry an " 'indeterminate' sentence, which means the defendant is sentenced to life imprisonment but the Board of Prison Terms can in its discretion release the defendant on parole." (*People v. Jefferson* (1999) 21 Cal.4th 86, 92.) While some indeterminate sentences expressly include a minimum prison term, others do not mention a minimum term, describing the sentence simply as " 'imprisonment in the state prison for life with the possibility of parole.' " (*Id.* at p. 93.) Section 664, the relevant punishment provision for attempted premeditated murder, is of the latter category. (See § 664, subd. (a).)

Although section 664, subdivision (a) does not specify a minimum term in the penalty provision for the specific crime in question, the minimum term can be found in section 3046, which provides in relevant part: "An inmate imprisoned under a life sentence shall not be paroled until he or she has served the greater of the following: [¶] (1) A term of at least seven calendar years. [¶] (2) A term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a

life sentence before eligibility for parole." (§ 3046, subd. (a); see also *People v. Jefferson, supra,* 21 Cal.4th at pp. 94-96 [in context of "Three Strikes" law, inmates serving a life sentence for attempted premeditated murder were eligible for parole only if they had served the minimum term of at least seven years pursuant to § 3046].)

In this case, the court sentenced defendant to life in prison with the possibility of parole, and then clarified that the minimum term was seven years pursuant to section 3046, subdivision (a)(1). The sentence was authorized. (*People v. Jefferson, supra,* 21 Cal.4th at pp. 94-96.) The minute order and abstract of judgment appropriately reflect the sentence as imposed. No correction is necessary.

III. DISPOSITION

Defendant's conviction is affirmed. The matter is remanded for resentencing to allow the trial court to consider whether to exercise its discretion to strike the firearm enhancement.

/S/

RENNER, J.

We concur:

/S/

ROBIE, Acting P. J.

/S/

MURRAY, J.